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BEFORE THE UTAH BOARD OF OIL, GAS AND MINING

Utah Chapter of the Sierra Club et al., *Petitioners,* vs. Utah Division of Oil, Gas and Mining, *Respondent,* *and* Alton Coal Development, LLC, *Respondent/Intervenor.*	Utah Division of Oil, Gas and Mining's Reply re: Request for Additional Briefing on Attorney Fees Shifting Docket No. 2009-019 Cause No. C/025/005

The Utah Division of Oil, Gas and Mining submits this Reply Memorandum in response to the opening briefing submitted in the attorney fees dispute between Alton Coal Development and Sierra Club et al.

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INTRODUCTION

This Reply Memorandum responds to the opening attorney-fee briefing filed by Sierra Club et al. and Alton Coal Development. The two issues presented in this round of briefing are:

(I) what is the proper objective standard for awarding attorney fees to a permittee under Board Rule B-15; and

(II) are individual claims within a suit separable from the whole for fee-shifting purposes?

The Division has considered the legal positions presented by both other parties and provides the Board with this response. In sum, the Board should apply Rule B-15 the same way that Utah courts shift fees under the Judicial Code, and it should apply that analysis to individual claims rather than to a proceeding as a whole.

ARGUMENT

There is agreement among the parties about Issue I, the objective prong of the B-15 test; everyone concurs that it is a "without merit" standard. Further, all parties generally agree that Utah's civil fee-shifting statute in the Judicial Code is an authoritative body of law for the Board to draw on when defining and interpreting what "without merit" actually means.

Each party's analysis of Issue I departs somewhat thereafter though. Sierra Club expands its analysis and moves beyond the Judicial Code by examining Utah Rule of Civil Procedure 11 and federal laws akin to

B-15. Alton Coal, on the other hand, focuses narrowly on the Judicial Code. In an effort to bolster its ultimate goal of using discovery to invade Sierra Club's inner workings, Alton rejects the very federal case law that the Board itself cited in its Supplemental Order and presents the Board with a wholly inaccurate version of Utah law.

On Issue II, Sierra Club urges the Board to make an interpretive choice—that individual claims are not separable from the whole—that would encourage administrative abuse and be contrary to public policy. The Division disagrees; claims can and should be analyzed individually.

To aid the Board in its decision-making, this Reply presents the Division's analysis of: (A) Sierra Club's separability argument; (B) Alton Coal's spurious explanation of Utah's "without merit" standard; and (C) several related points raised by the opening briefs.

A. The Board should not adopt Sierra Club's all-or-nothing approach to the separability issue because it encourages the very conduct that Rule B-15 is meant to correct.

Rule B-15(d) is intended to protect a permittee from abusive litigation, but Sierra Club's interpretation would diminish that protection. In its opening brief, Sierra Club presented the Board with a highly text-based argument that focused on word choice at the expense of context. In short, the argument created a syllogism based on two premises: one, that Rule B-15's plain language contemplates "proceedings"; and two, that a single proceeding is (typically) composed of multiple claims. Because a claim is a subset of a

proceeding, argues Sierra Club, a fee award is only appropriate where the entire *proceeding* is in bad faith; a bad faith *claim* does not taint the whole proceeding.

The Division acknowledges that the plain-language simplicity of Sierra Club's approach holds some appeal, but their syllogism is out-of-context and reaches the wrong conclusion for two reasons. First, the whole point of this round of briefing is that Rule B-15 is ambiguous. If B-15 was really clear on its face from its plain language, then this round of briefing was unnecessary. Indeed, the Board based its Supplemental Order on that very conclusion—that B-15 is ambiguous and includes an objective element not explicitly referenced by the plain language of the rule. Simultaneously arguing that Rule B-15's language is ambiguous for one purpose, but also that the plain language controls for a related purpose, is unpersuasive.

Second, even if the Board found the plain language compelling in this instance, the resulting rule would be contrary to the public policy underpinning the Utah Coal Act and Rule B-15. Here, the policy is simple: public participation in the Act is essential, but permittees should not be subjected to legal harassment through meritless claims. Under Sierra Club's approach, a permit challenger could dream up as many frivolous claims as it wanted so long as it had one meritorious claim to use as a shield. That result conflicts with the purpose of Rule B-15 and the Board should adopt the position that individual claims are separable for fee-shifting purposes.

B. The Board should reject Alton Coal's assessment of Utah's objective "without merit" standard because it completely misrepresents what that standard is.

Alton's argument on the objective standard of Rule B-15 opens innocuously enough by asking the Board to follow established Utah law, but then devolves by inventing law that suits their policy preference. Put simply, Alton supports a naked assertion with cases that stand for exactly the opposite proposition. The Board should disregard their so-called argument because it is fatally flawed and lacks any support in case law or statute.

Superficially, Alton asks the Board to "adopt Utah's 'without merit' standard" from the civil fee-shifting statute. Alton Coal Development, LLC's Memorandum of Points and Authorities in Response to the Board's Supplemental Order at 4 (hereafter, *Alton's Memorandum*). The Division agrees; this is an infinitely reasonable suggestion.

Immediately after asking the Board to do a very reasonable thing, however, Alton asserts that a claim is without merit simply by virtue of having lost in court: if "a party has lost on the merits, then that party's claims were 'without merit.'" *Id.* at 3. That is, Alton asserts that the objective prong for fee shifting in Utah is satisfied *whenever the permittee wins*. *Id.* That notion is baseless.

In fact, the formula that Alton dreamt up—but certified to the Board is the current state of Utah law—is not the law in Utah. Or in any other jurisdiction in America. The actual definition of "without merit," that the Utah Supreme Court established back in 1983, is a claim "bordering

on frivolity" that "is of little weight or importance having no basis in law or fact." *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983) (quotation marks omitted). *Cady* defined "without merit" over three decades ago, remains the definitive statement of Utah law, and is regularly cited by Utah courts. *See Verdi Energy Grp., Inc. v. Nelson*, 2014 UT App 101, ¶ 33, 326 P.3d 104 (citing *Cady* for the definition of "without merit" less than one year ago). Alton's definition of without merit is itself lacking a basis in law.

Also in *Cady*, on the very same page Alton cites in its brief, Utah's high court explicitly rejected the contention that being a prevailing party is enough to satisfy the objective prong of the fee-shifting test. Under Utah law, "two elements are required *in addition to* being a prevailing party." *Id.* at 151 (emphasis added). Alton's contention on Issue I is so legally anemic that the Board should disregard it entirely.

C. The Board should consider two additional issues in its deliberations on this topic.

The Division takes this opportunity to address two additional issues raised by the opening briefing. First, Sierra Club's argument on Issue I draws on Utah Rule of Civil Procedure 11 and on federal laws with provisions similar to Rule B-15. As a general matter, the Division agrees that both bodies of law are useful and provide some insight into a complicated legal question. However, there are differences between the three, some nuanced and some substantial.

For instance, Rule 11 applies to any document signed by an attorney, rather than to entire claims or actions like B-15. Indeed, Rule 11's central purpose "is to deter baseless filings" by "impos[ing] a duty *on attorneys* to certify that they have conducted a reasonable inquiry" into the subject of their filing. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) (emphasis added). In line with its purpose, awarding fees is only one of a variety of sanctions available under Rule 11, *id.*, where B-15's sole remedy is fee shifting. That is, Rule 11 takes aim primarily at attorneys through a variety of means, where B-15 sanctions the party itself and provides only one remedy. Although they overlap somewhat, the mechanics of the two rules are different because they solve different problems. The Division views the Judicial Code as more analogous and therefore more persuasive.

Second, Alton contends that adopting the Division's legal construction of B-15 "would require BOGM to reexamine each of Petitioners' 17 counts … review the entire record … and essentially retry the case." *Alton's Memorandum* at 5. Not so. That contention fundamentally misunderstands the Board's role; the Board is as an adjudicative body, not an investigative one.

In reality, the petitioner for fees (here, Alton Coal) bears the burden of proof and persuasion. That means that Alton, not the Board, must comb the record and present evidence that proves a given claim lacked merit. If Alton can do that, then they have satisfied the objective prong of B-15. But it is certainly not the Board's job to do it for them.

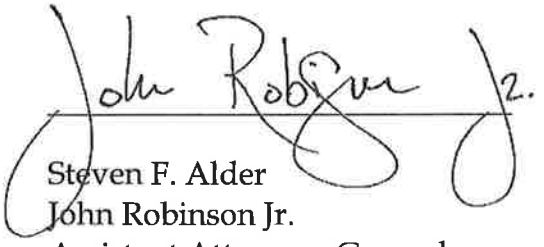
CONCLUSION

For these reasons, the Division urges the Board to do two things. First, it should retain flexibility by ruling that fee shifting under Rule B-15 is not an all-or-nothing proposition and that claims can be analyzed individually.

Second, the Board should narrowly construe the objective prong of B-15 to mirror the Utah Judicial Code. While the Board need not explicitly reject other sources of law, a narrow construction will benefit the Board and the parties before it: there is a substantial body of law to draw on, it promotes consistency between the Utah administrative and judicial systems, and it avoids future bickering over minor differences in external law.

Submitted on January 23, 2015.

UTAH ATTORNEY GENERAL'S OFFICE



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CERTIFICATE OF SERVICE

I certify that I delivered a copy of the Utah Division of Oil, Gas and Mining's Reply Memorandum re: Request for Additional Briefing on Attorney Fees Shifting to the following parties by email on January 23, 2015:

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